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No. 00-0092

IN THE SUPREME COURT OF THE UNITED STATES

LISA HAWKINS, ***Petitioner,***

v.

PEPSICO, INC., d/b/a Pepsi-Cola North America, Pepsi-Cola Bottling North America, and Pepsi South, ***Respondent.***

On Petition for Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

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PETITIONER'S REPLY MEMORANDUM

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SUMMARY OF ARGUMENT

Pepsi totally misconstrues this Court's opinion in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. ____, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). The obvious intent of this unanimous Court in *Reeves* was to provide clear rules for discrimination cases regarding the kind and amount of evidence necessary to sustain a jury's verdict or to oppose dismissal as a matter of law. This case presents the classic example of a distortion of *Reeves* that is being used and will likely continue to be seized upon in the future to undermine that decision. The new message will be that, if an employer articulates that its employment decision is based on subjective, conclusory opinions within the decisionmaker's own mind, this decision will be indisputable and is likely to escape judicial scrutiny, challenge, and review. Such a decision is virtually unreviewable because, as Pepsi argues, what is important is only the subjective opinion of the decision maker.

As to Pepsi's argument that this Court ought not to expend its time and energy on "pedestrian" evidentiary issues, the same could have been said for *Reeves*. This is Pepsi's shorthand excuse, evidenced throughout its entire Opposition Brief, to avoid an application of *Reeves*. Pepsi's analysis and argument seems to be that, since its articulated reason for Hawkins' termination is "poor performance" as seen through the eyes of Price only, it need not apply the *Reeves'* rules. Thus, the Opposition Brief exemplifies an interpretation of *Reeves* that, when subjective, conclusory reasons are articulated by an employer, a court is not required to disregard all evidence favorable to the moving party that the jury is not required to believe; credence need not be given to the evidence favoring the nonmovant; contradicted and impeached evidence of the moving party can be considered; and evidence from disinterested witnesses need not be considered.

I. SUBJECTIVE CONCLUSORY ARTICULATED OPINIONS MUST NOT ESCAPE SCRUTINY AS PER *REEVES'* PRINCIPLES.

The simple results of the tactic used by Pepsi are to avoid and circumvent the *Reeves'* rules under the guise that the only relevant inquiry is the decisionmaker's self-serving, conclusive, subjective opinion. Therefore, nothing else is relevant to challenge what is in Price's mind. Reduced to its essence, Pepsi's case is simple: "...Pepsi terminated her [Hawkins] because her supervisor [Sally Price] was dissatisfied with her work." (Opposition Brief at 1.) Using Pepsi's words, Hawkins failed:

> to conform to her supervisor's expectations of appropriate managerial skills and work quality. Those subjective assessments are not capable of a "true/false" determination or some absolute litmus test for "acceptability."...Thus, as the Fourth Circuit correctly determined, ***only*** Ms. Price's perception of "good" or "acceptable" performance is relevant.

(Opposition Brief at 16-17)(Emphasis added). In essence, Pepsi and the Fourth Circuit contend that the ONLY evidence it is legally required or allowed to consider is Price's subjective opinion, which is not subject to objective analysis. As the Fourth Circuit stated, "Hawkins fails, for example, to supply evidence that Price actually believed her performance was good." (App. at 8.)

The extension of Pepsi's logic seems to be that the principles from *Reeves* do not apply to conclusory, subjective evaluations. The *Reeves'* rules, as Pepsi would adapt them for application to subjective opinions, seem to be as follows:

> The court is required to accept and believe the moving party's evidence because it is the only relevant evidence. No credence need be given to evidence favoring the nonmovant, because this evidence is all irrelevant and cannot contradict or impeach the moving party's evidence, what the decisionmaker states is her subjective opinion. Since the only relevant evidence is what is in the decisionmaker's mind, and the nonmovant's abundant, objective and independent evidence is all irrelevant to what is within the decisionmaker's mind, no possible reasonable inferences can extend from the nonmovant's evidence. In so assessing the amount and kind of evidence, the court need not make credibility determinations in that the decisionmaker's statements stand alone and cannot be challenged; the court does not weigh the evidence because the only relevant evidence is that from the decisionmaker's own mouth and set upon paper in her self-serving, subjective, conclusory evaluation.

This approach is likely to become THE way to circumvent judicial scrutiny of discrimination cases, and the public policy against unlawful discrimination will be thwarted. Why should an employer be objective about its decisions which will then be subjected to judicial scrutiny, when subjective opinions, as thus analyzed, are seemingly immune from review?

II. THIS CASE PRESENTS A UNIQUE OPPORTUNITY FOR THIS COURT TO CLARIFY INAPPROPRIATE USE OF THE LIMITED *REEVES'* EXCLUSION TO PERMIT DISMISSAL.

Reeves describes those circumstances when a jury may not be permitted to draw the inference that a proffer of evidence is discrimination, and a case is properly dismissed:

> if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Reeves, 120 S. Ct. at 2019, 147 L. Ed. 2d at 105.

This case is a unique opportunity to clarify and confirm that this limited exclusion cannot be used to shield from a jury's scrutiny an employer resting behind a naked conclusory, subjective assertion of "poor performance" solely within a decisionmaker's mind. In addition, the abundant evidence in this case provides an opportunity for this Court to build on *Reeves'* guidance as to the proper consideration of evidence in such a subjective situation. This case includes a full development of its facts and Pepsi's admission of its total reliance on Price's conclusory, subjective evaluation of Hawkins' performance (subjective, uncorroborated, and only advanced by the decisionmaker), in stark contrast to Hawkins' evidence that she was performing well (supported by abundant evidence, much of which is objective, including testimony of independent witnesses and documentary evidence). Further, although not required by *Reeves*, Hawkins presented additional abundant evidence from which unlawful retaliatory and

discriminatory intent can be inferred.

III. LIKE *REEVES*, THIS CASE DOES NOT REST ON MERE "FACTUAL ERRORS OR MISAPPLICATION OF PROPERLY STATED LEGAL PRINCIPLES" OR "PEDESTRIAN" EVIDENTIARY ISSUES. LEGAL PRINCIPLES APPLIED IN THIS CASE GUTTED THE PROPER CONSIDERATION OF PLAINTIFF'S EVIDENCE, CONTRARY TO THE INTENT OF *REEVES*.

Pepsi dismisses the treatment of Hawkins' evidence as "pedestrian" and "bearing little attention" and mere "factual errors or misapplication of properly stated legal principles." (Opposition Brief at 14, 23.) Perhaps the same was said to this Court in *Reeves*. Rather, the evidence in this case begs from this Court clarity for evaluation of evidence in situations involving subjective articulated justifications for employers' actions.

Price did know Hawkins was black when she was permitted to transfer into the CSC in June 1993; but the façade of Pepsi required her to have blacks in top management or she would not appear "right side up" to comply with the Pepsi's desired image. JA 2885-2886. Within less than one year, the only two blacks in management, Hawkins and Canady, were labeled "below target" by Price's subjective analysis, despite Canady's MBA from Harvard. JA 2946. Only AFTER Hawkins' transfer to the CSC did Price learn Hawkins had complained previously of a racial matter, that she had a problem with her prior employment and that she might be suing Pepsi.[1]

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[1] Before Price hired Hawkins into the CSC, she admitted she had no knowledge of any complaints by Hawkins about discrimination at Pepsi. JA 3623. Then, Marvin, CSC Human Resources Director, told Price all she knew. Marvin learned of a problem with Hawkins' prior employment and that Hawkins might be suing the Pepsi. JA 2716, 2729. Before the fall of 1993, Marvin had a discussion with Hawkins' former supervisor during the

Price learned this before her October 1993 developmental feedback on Hawkins. The developmental feedback was only a single page. The conclusory subjective criticisms were contradicted by Hawkins' substantial evidence, and the allegation that Hawkins' failure to give appropriate direction to Debra Shore was contradicted by Ms. Shore. JA 3175-3176.

On December 15, 1993, Hawkins wrote Price and copied Barnes, Price's supervisor, complaining of experiencing 3.5 years of racism at Pepsi. In response, Price advised Hawkins that Price had the support of senior management. JA 2110.

On February 3, 1994, Hawkins' was given an evaluation by Price. Her difficulties, all subjective in Price's mind, were listed as (1) team building and alignment, (2) results orientation, (3) thoughtful analysis. Hawkins nonetheless rebutted these alleged shortcomings, as well as virtually every other allegation in the document. Not one independent witness or any independent documentary evidence corroborated Price's subjective opinion. In contrast, Hawkins' presented abundant, corroborated, and independent evidence. To the limited extent Price's subjective analysis was semi-grounded in verifiable objective facts, Hawkins' evidence contradicted and impeached Price's naked opinion.

Pepsi attacks Hawkins' case as a whole indicating that she has not proven racial or retaliatory discrimination because she has not shown that similarly-situated white employees were treated differently. While Hawkins agrees that comparison employees is one vehicle of proving discrimination, it is neither

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time of the racial issues between Hawkins and the Pepsi bottler. JA 2678-2679. She understood that there was some concern about racial issues involved in the tension with the bottler and Hawkins. JA 2727. Marvin brought the issue up with Price who was surprised. JA 2720-2721. Marvin told Price all she had understood from this supervisor, and this was before the fall of 1993. JA 2728-2729.

required nor the only available method of proof. Nonetheless, Hawkins has provided ample evidence that similarly-situated treated white employees were treated differently.

Some of those examples follow. White co-worker Kevin McInerney, the only other Tel-Sell Manager and a direct report to Price, was admittedly not a team player, but he was not rated below target by Price, as was Hawkins, who was a team player. JA 2051-2055, 2915-2916, 3133, 3152-3155, 3240. Smith, a white co-worker of Hawkins and also a direct report to Price, was not criticized by Price or rated below target for taking a checklist approach to telephone interviews, as was Hawkins. JA 1905-1906, 2915-2916, 3195-3196. Two white co-workers testified as to Price's summary dismissal of Hawkins' ideas in team meetings, contrary to those of the white employees. JA 3150, 3215-3217. Hawkins, Canady, and Shore (all black) were criticized by Price as being "not being of the caliber" for their jobs, but no similarly-situated white were so criticized by Price. JA 2064-2073, 2108. Contrary to whites who were direct reports to Price, Hawkins was given directions and instructions by Price on scraps of paper. JA 1856-1857, 3206, 3802-3807, 4004. At a party, all other white managers and their spouses were given a gift by Price, but Price gave no gift to Hawkins, the only black in attendance. JA 2943-2944. While Pepsi minimizes Hawkins' 53 documents as just showing she was "working" (Opposition Brief at 17), this evidence proved that Hawkins was performing or had completed work she was accused of not doing. Co-workers' testimony was independent probative evidence in that they worked with Hawkins on many of these projects, were her teammates, and observed her work. According to Pepsi's 360 degree policy, which Price did not follow with Hawkins, Price was required to secure feedback from co-workers and subordinates as a part of the evaluation process. JA 1931-1933, 2916. Nonetheless, much of this firsthand evidence from co-workers and subordinates was ruled inadmissible.

By mid-fall 1993, at or about the same time as Hawkins' development feedback, not only was Hawkins reporting her complaints to top black executives at Pepsi, but the only other black at the CSC, Fred Canady, did likewise. JA 2051, 2055-58, 2061-65, 2128-2129. Later, in frustration at Pepsi's lack of response, Hawkins, while responding to a request for 360 degree feedback on Price, complained to Price's supervisor, Brenda Barnes, Pepsi's Chief Operating Officer about suffering 3.5 years of racism at Pepsi. Incredibly, while Pepsi admits Hawkins' reports, including the written one to Price's supervisor just two months before Hawkins' termination, Pepsi dismisses Hawkins' reports. Rather, Pepsi labels its non-responses as "investigations" (Opposition Brief, at 10-11), and dismisses Hawkins' pleas for help blaming Hawkins. "To the extent that Ms. Hawkins is concerned that no corrective action was taken, she made no showing that these executives actually believed that there was a racial discrimination problem at the CSC." (Opposition Brief at 11.) Pepsi's "investigations" included talking only with the decisionmaker or her human resources director. Barnes talked with no one at the CSC, white or black, including Hawkins. She left matters to Price and allowed Plaintiff's termination.

IV. *HARRIS* APPLIES TO RACIALLY HOSTILE ENVIRONMENTS WHICH NEED NOT INVOLVE RACIAL SLURS AND NOOSES TO SURVIVE SUMMARY JUDGMENT.

This Court's judgment in *Harris v. Forklift Sys., Inc*, 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993), did affirm that sexually hostile environment claims are recognized when the workplace environment is sufficiently severe and pervasive to modify a term or condition of employment. This Court should send the clear message that this same standard applies to prohibit racial and retaliatory hostile workplace environments, and that legally-recognized claims are not limited to the more blatant, overt racism exemplified in nooses

and racial slurs. This Court should make clear that unlawful racism encompasses the equally devastating subtle bigotry that can create a hostile environment. Racism in the 21st century frequently take a different shape and form than in the past, that of subtle bigotry.

As in this case, it can take the form of regular, repeated open ridicule; belittlement; humiliation; berating in public; assertions that someone just is not good enough; singling the person out for treatment different from her white peers; rolling eyes when suggestions are made etc, all based on race. JA 2072-2089, 2016-2114, 2123-2125, 1873-1875, 3150, 3211-3217. Rather than taking these examples one isolated instance at a time, the aggregate effect on the atmosphere is the issue.

This hostility can be the workplace equivalent of child abuse -- daily belittling and humiliating results in permanent injuries and psychological scars. If the blacks at the CSC found that Price's management created an environment where blacks felt like slaves on a plantation, then this Court should make clear that a jury is permitted to determine whether this altered the terms and conditions of Hawkins' employment.

CONCLUSION

This Court should clarify the *Reeves'* standard, that subjective opinions are not immune from judicial scrutiny and confirm the standards so applicable, if any different than Reeves. This case clearly presents this issue because of the assertion that ONLY Price's perception is relevant, and by the wholesale failure to properly accepts and weighs the evidence in this case.

The Court is urged to grant certiorari to clarify these significant issues; to ensure enforcement of the civil rights laws; and to provide the Reeves sequel for guidance to the federal courts, employers, and employees for the proper

scrutiny and treatment of subjective proffered reasons that are used to camouflage discrimination. Employers ought not to be rewarded for exclusively using conclusory subjective opinions by exempting them from judicial scrutiny.

Respectfully submitted,

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